No. 3022
No. 3023
No. 3024

United States Circuit Court of Appeals

For the Ninth Circuit

LOGAN BILLINGSLEY and
FRED BILLINGSLEY,
Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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Smiley Printing Company

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MOTION TO DISMISS

Comes now the United States of America, defendant in error herein, by its counsel, and moves the court for dismissal of cause No. 3022, 3023 and

3024, and each of them, for the reason that the plaintiffs in error and their counsel have failed, neglected and refused to file with the Clerk of this court twenty copies of a printed brief and have failed, neglected and refused to serve upon counsel for defendant in error a copy of said brief at a date further removed than fifteen days prior to said hearing.

ARGUMENT ON MOTION

Causes No. 3022, No. 3023 and No. 3024 were originally assigned for argument in this court on September 19, 1917, at Seattle, Washington.

Rule 24, Sec. 1, provides:

> "The counsel for the plaintiff in error or appellant shall file with the clerk of this court twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appelle one copy thereof, at least fifteen days befor the case is called for argument."

No briefs were served upon counsel for defendant in error and none filed with the court prior to that date. Counsel for plaintiff in error. William R. Bell, then appeared beform the court and asked for further assignment of the cases at a later date, giving as a reason his inability to prepare his briefs

due to the press of other business. Counsel for the Government, while not consenting, suggested to the court his unwillingness to object to the request of plaintiffs' counsel if the cause could be assigned to such date as would not impose cost upon the government. The cases were then tentatively assigned by the court for October 5, 1917, and prior thereto, upon its own motion definitely assigned for October 9, 1917, at San Francisco, at which date other causes from this district were to be heard. At the time of continuance counsel for plaintiff in error assured counsel for the Government that briefs herein would be served not later than September 25, 1917. At date of writing this brief no service has been in fact made, and no briefs filed with the Clerk of this court so far as known to the writer.

As set forth in the affidavit in support of this motion, effort was made, by telephone to induce counsel to prepare and serve his brief herein, and thereafter, upon receipt of telegraphic advice from the Clerk of this court the motion and affidavit filed here in were left at the office of counsel for plaintiffs in error.

This motion is not urged upon the court with any

thought that technical advantage should, or would, in any case, be taken of defendant's rigth of review of a criminal case. But the attitude of the plaintiff seeking appellate relief should at least not obstruct a a speedy and orderly presentation of the matter. Under the conditions outlined herein such a result becomes all but impossible.

The cases brought here are, as to each, in the same situation, and should, it is urged, to the court be dismissed.

STATEMENT OF CASE

If the court should be of the opinion that the question raised by the writ should be reviewed here, counsel for the defendant in error must confess himself somewhat at a loss as to the scope of the inquiry. As orally stated by counsel for plaintiff in error, it was the intention to present the single question:

> "May the defendant in a criminal case who has entered in open court his plea of guilty, *as a matter of right,* change that plea to not guilty"
>
> Plaintiffs in error contend that he may do so.
>
> The defendant in error contends that the ques-

tion is one for the discretion of the court under all the circumstances of the particular case. That in the absence of any showing of an abuse of judicial discretion, the judgment should be sustained. The three cases present identical questions on this point.

The history of case 3,500, as shown by the transcript follows:

> Cause No. 3,500—Criminal indictment charging violation of Act of February 4, 1887, as amended, returned December 22, 1916. (Tr. p. 45) Plea of guilty entered by defendant, Logan Billingsley, December 28, 1916, accompanied by counsel, George F. Vanderveer. Plea as to count II and judgment postponed. Tr. p. 45.)
>
> Sentence of Logan Billingsley to thirteen months at the United States Penitentiary at McNeil Island on April 19, 1917, to run concurrently with causes No. 3492 and No. 3557. (Tr. p. 47.)
>
> Petition for writ of error filed and writ allowed May 10, 1917. (Tr. p. 51).

In the Transcript of Record as printed (No. 3,500) Fred Billingsley is not shown as joining in the petition for the writ but his situation is identical with that of Logan Billingsley with respect to the question raised.

No affidavit was offered to the District Court and none appears in the transcript setting forth any facts upon which application was based for change of plea.

ARGUMENT.

It is a legal axion that every presumption of law rises in support of a judgment once entered. The jurisdiction of the parties, the contentions of the pleaders and the disturbing contradictions of evidence are fused into a final result which is described by the legal term, "judgment." In a criminal cause a defendant has certain legal privileges and rights but he remains, still, in legal parlance, a pleader. If he sees fit, under circumstances which by their very solemnity invite deliberation, to admit his guilt and waive the proof of it, he should be and is, by every moral and legal principal, bound by his act. The only concern which courts might feel is that the plea should not be entered under circumstances which might be indicative of fraud or decite. But of the conditions surrounding the defendant, the trial court is, and must remain, the judge, unless those circumstances are by proper affidavits or evidence

otherwise produced and laid before the appelllate court. As suggested before, there is nothing here to give the appellate court any information suggesting the slightest irreguearity in the judgment as entered. The bareness of the record speaks for itself. The court after listening for three full days to these defendants recital on oath of their part in the long series of misdemeanors and crimes described in these indictments was undoubtedly convinced of the defendants' clearness of thought and decision of mind. The defendants had answered that they were guilty to the charge in the indictment and thereafter on oath recited facts which abundantly proved their guilt.

The writer in "Cyc" Vol. 12, p. 353, says:

> "It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown the refusal of permission to withdraw a plea is not error.
>
> "A plea of guilty is a confession of guilt, and is equivalent to conviction. The court must pronounce judgment and sentance as upon a verdict of guilty."

A case closely in point is that of Curran vs. State, 99 Pac. 420, 53 Ore. 154, in which there was a

plea of guilty to an unlawful sale of liquors. An attempt was made to withdraw the plea. The court points out that no attempt was made by affidavit or otherwise to support the application.

The court says:

> "The absolute right of the party, after pleading guilty to criminal charge to withdraw such admission and to interpose a plea of not guilty, is generally denied; the rule being that determination of the question rests in the judicial discretion *of the court.*"

The Supreme Court of the state of Washington, in the case of State v. Cimini. 101 Pac. 891, 53 Wash., 268, takes the same view although it is contended that Cimini had entered his plea on a promise of immunity.

In the Virginia case of Early v. Commonwealth, 11 S. E. 795, in which defendant was charged with murder, it was held not error to refuse the defendant permission to withdraw a plea of guilty and enter a plea af abatement.

The attention of the court is particlarly called to the case of State v. Shanley (West Virginia) 183 S. E. 734, where the question is discussed through several pages and many cases are reviewed.

The Court says in part:

> "It would be taking a long step toward unsettling proceedings in such cases if the defendant is encouraged to go broadcast in search of loose verbal agreements with which to nullify and set aside confessions of guilt made in open court, and entered without qualification on the record.
>
> "The case for relief must be very strong and urgent, and clearly and certainly made out before this court on the grounds of public policy, if on no other, ought to interfere."

Other state cases are found in Barton v. State, 23 Wis. 587, 72 Ala. 164; 64 Cal 401; reported in 1 Pac. 490.

In the following Federal cases similar questions have been decided along parallel lines.

In the United States v. Bayard, 16 Fed. 382, it is said:

> "After such plea the only objection open to them on this score is that the indictment fails to describe the various acts intended to be proved with that reasonable certainty which the law required to constitute a valid indictment."

In Andrews v. United States, 224 Fed. 418, it it was held that action of court in refusing to permit the withdrawl of a plea of not guilty for the purpose of interposing a demurrer is a matter of discretion.

In the case of United States v. Lewis, 192 Fed. 637, a plea of not guilty was entered. Permission to withdraw the plea and file a motion to quash was held a matter of discretion.

Judge Campbell held in the case of United States v. London, 176 Fed 977, that the refusal to permit a plea of guilty to be withdrawn to interpose a motion to quash was a matter of discretion with the trial court.

This appellate court in the recent case of Andrews v. U. S. 224 Fed. 418, held that the action of the court in refusing to permit a plea of *not* guilty to be withdrawn for the purpose of interposing a demurrer was not error, that it was a matter of discretion with the court.

In the three cases brought here for review there is no suggestion of abuse of discretion and cannot with truth be urged by counsel. The District court knew the circumstances and was entirely familiar with the facts. He acted well within his discretion in his conclusion. The action of the trial court should be sustained.

Respectfully submitted,

CLAY ALLEN,

Attorney for Defendant in Error.